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A rite of passage: Terms and conditions and social responsibility

With the current spate of cases, consultations and calls for evidence being put out by the Powers That Be, the UK's gambling industry can be forgiven for thinking that there is a witch hunt out to get it. There certainly is very considerable activity on social responsibility and terms and conditions. Susanna FitzGerald QC, a Barrister at One Essex Court, explains why she suspects that there may well be further high profile cases hitting the headlines following BGO and 888, and that this current activity against the online gambling industry likely will not cease any time soon, but will only intensify.

There are strong parallels between what has happened to the drinks trade in the last few years following the passing of the Licensing Act 2003, which aimed to liberalise the alcohol licensing laws and get rid of some of the old antiquated restrictions such as rigid permitted hours, and what is happening now to the gambling industry and in particular the online industry and the bookies. The idea behind the Licensing Act was to turn the trade into something like the European system where people would have a drink probably with a meal and drinking would be an innocent part of the culture; binge drinking was not contemplated. However, once the law was passed, there was soon a public outcry against so-called '24 hour drinking' (which is largely a myth) and increasing concern from residents, the police and the locally elected councillors about disorder and over provision of alcohol, fuelled by the health lobby who wanted to ban alcohol altogether if they possibly could. Does any of this sound familiar? So a string of amendment acts were passed, giving the police and local authorities increasingly draconian powers over licensed premises and generally upping the ante against the trade. The recent inflammatory headlines about alcohol and cancer are only the latest attack. The result has been that the trade has

become far more aware of matters like preventing sales to under 18s, trying to prevent disorder, and lowering the percentage of alcohol in some drinks. Despite all this, the licensed trade is still flourishing although it has had to change. Now it is the turn of the gambling industry to feel picked on.

One can see the parallels with what happened to the licensed trade, starting with the Gambling Act, which was to get rid of the old antiquated gaming laws and bring gambling into mainstream leisure activity. No longer is it necessary to prove demand in an area, and there is far greater freedom on advertising across the industry. However, gambling, like alcohol, is a sensitive subject amongst many in the general population where, as recent events have shown, there is a strong feeling that there is something dangerous about gambling and that it needs to be tightly controlled.

The current CEO of the Gambling Commission, Sarah Harrison, comes from a consumer protection background and it was inevitable therefore that as consumers become more vociferous about their complaints, she would take up the wand of consumer protectionism at the Commission. The FOBT debate and the recent headline grabbing

cases exacerbate the situation and increase the distrust of the industry. From the escalation in tough action that the Commission has been taking, moving from voluntary settlements to swingeing fines, it cannot be long before a company loses its licence.

Obviously customers will want to take advantage of a 'free' bet or bonus, and operators understandably want to protect themselves. Their terms and conditions are there to protect them, often from being taken for a ride by scammers, fraudsters and the wily professional gamblers who just want to make as much money out of them as they possibly can.

The *Philip Ivey* case (*Ivey v. Genting Casinos UK Limited T/A Crockfords Club* 2016 EWCA Civ 1093) is an illustration of a skilled professional gambler who felt that what he did was just gamesmanship, even though successive courts found he had 'cheated' within the terms of the Gambling Act. Some of the protection that some operators have put in place is clearly being and may in the future be found to be unreasonable, because it is too one sided and restrictive, and unfair to ordinary punters who, because the restrictions are not made clear to them, do not know what it is that they are entering into when they



accept the free bet or bonus. The Competition and Markets Authority ('CMA') is looking into what it describes as "obstacles" customers face when they try to withdraw their money after gaming or betting online.

Terms and conditions, like leases, grow over time, often without the company whose terms they are looking at the whole of them to see whether they are still fair or not. This can result in terms that mean players are locked into complex and rigid requirements, which are unlikely to be considered to be fair to consumers at large, such as promotions that are difficult to understand or unachievable, or companies having a wide discretion to cancel bets or alter odds after bets have been accepted because they made a mistake when the odds were first set, restrictions on a player's right to withdraw winnings made from gameplay with their deposit unless they meet extensive wagering requirements, and potentially unfair rules that restrict certain play strategies, on which operators rely to deny customers a payout when they come to claim their winnings. Inadequate or unclear information about the restrictions and conditions that apply to the promotion or sign-up provisions which make it difficult for the customer to evaluate whether

he/she should take it up or not, have contributed considerably to a growing lack of trust in the gambling industry. Operators must have protection from increasingly sophisticated and savvy gamblers and scammers, and there has to be a balance between the terms and conditions that offer protection to the company and fairness to the consumer. This is certainly not an easy balancing act. The CMA is apparently receiving a great deal of evidence in its consultation about terms and conditions and it is generally expected that it will take action. Many companies are already wisely having their terms and conditions professionally scrutinised now, and I recommend they revisit them regularly. Technology can also offer very good protection. Such things as tracking user IPs, and watching gamblers' play patterns to see how much they are gambling, how often and for how long, are already there. Thousands of accounts have already been closed by operators because customers have not given them the necessary information for operators to know them sufficiently. As with everything online, the technology has to improve as the scammers become more sophisticated.

The lifting of the restrictions on advertising in the Gambling Act 2005

has meant that ordinary citizens sitting at home with their teenage children feel bombarded with advertising, and has added to the crisis in trust. Advertising is a difficult subject; it is beneficial for the newer companies who want to get into the market, but many other more established companies are not very interested in carrying on with their adverts although they feel they have to because their competitors do it. However, there is little that the individual companies can do to limit it amongst themselves without having the accusation made that there is a cartel. Any action on advertising needs therefore to come from the Government, and the Remote Gambling Association ('RGA') and other parts of the industry have been discussing this with the DCMS and the ASA. The DCMS, as part of the triennial review looking not only at FOBTs but also advertising, may result in at least some advertising restrictions.

There are huge pressures on the industry, not least of which is to satisfy shareholders and to make as much money as possible for them. Many CEOs are only in post for a few years and therefore it is hard to take a long term strategy on board. It may be felt that there is always a reason not to do something if it is going to mean that the company

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will lose money from the bottomline. Added to this is the challenge for companies based overseas, who advertise to the UK market, and so have to be licensed here. For companies that have been licensed by offshore regulators, with a completely different attitude to terms and conditions and social responsibility compared to the UK, and who may not have been concerned by terms and conditions, this is particularly tough to take on board. The culture shock for such companies must have been considerable when they found themselves not only faced with the LCCP, increased social responsibility duties and scrutiny of their terms and conditions, but also hammered on tax and restricted on the advertising that they are permitted to carry out.

Are 'free' bets or big bonuses things of the past? The competition between operators, who are all chasing the same customers, is intense and so far the free bet or the large bonus has been the way to do that, although as so many operators offer them, it just means that each operator is eroding its margins. Add to this that free bets and bonuses are going to attract gaming duty in the autumn and therefore will get more expensive for operators, and they may well fade away naturally. There may be better ways of attracting and keeping customers, such as unique content: in-play betting and mobile betting in the day are two examples of that. The gambling industry is immensely creative and I have seen over the years many new practices

coming in, which have happily kept my children in shoes. It is increasingly high tech and I have no doubt that new novel ideas will and must emerge. Since social responsibility became far more serious in recent years, the industry has done a considerable amount to be socially responsible and up to date on the current LCCP and advertising requirements, and it should be given great credit for that. However from the cases coming through, it is obvious that even more needs to be done to increase the trust in the gambling industry amongst the Powers That Be and the general populace.

The increasing research into problem gambling or at risk gamblers does help to indicate what problematic play is and to see what good interventions look like. The companies may want to trial different types of intervention, in addition to self-exclusion, to see what works best for each individual company. The advent of the Gamstop central self-exclusion system later on this year may well be very helpful and will hopefully prevent what happened to 888 happening again, if properly set up across all gambling activities.

Many non-executive directors do not wish to be associated with a company which has failed in the area of social responsibility and so, increasingly, it is a major item with gambling companies' boards. However, social responsibility needs to be the ethos of the whole company, not only as discussed by

the main board, and that is a matter of training and leadership from the top. It is not enough, for example, for a company to have a self-exclusion system in place if in fact it does not achieve its purpose, as shown by the 888 case. Actions promised to the regulator have to be put into operation promptly and effectively across the company (see the BGO case). The main board may be unaware that provisions about terms and conditions or social responsibility are not working, but others further down in the chain of command may be aware, and all must be trained and encouraged to take action. In future, the whole culture has to change so that all the people working for online companies and as much as possible their affiliates, take social responsibility to heart. I remember at a Harm Minimisation Conference one senior executive of a leading gambling operator saying to a speaker on social responsibility, with anguish in his voice: "Just tell us what to do and we will do it!" He was met with the tart rejoinder that box ticking was not the point: social responsibility had to be an essential part of the outlook of the whole company.

All this activity is extremely painful for the industry but in the current climate it is an essential rite of passage for it to grow and succeed in the long term. Doubtless there will be sharp pain, but at the end of it, once the industry has taken that pain, the rite of passage will be over and it is likely to be far more successful in the future as the level of trust in the industry rises.